

Hebenstreit added that Director Carter recently approved a temporary rule to govern the same subject. The temporary rule is published at www.in.gov/legislative/iac/20110629-IR-312110376ERA.xml.pdf and became effective July 1 [2011].

Commissioner Easterly said that at IDEM, permits are effective unless a “stay” is granted by an administrative law judge. He asked if DNR functioned differently and if a result of the amendments would be to delay effectiveness until completion of an appeal.

Hebenstreit responded that DNR permits are effective unless stayed by a Commission ALJ, but many applicants do not wish to act upon a permit until finality is achieved in the review process. The amendments would not require an applicant to await the completion of an AOPA proceeding. But the amendments would extend the period of viability for a permit until two years after an appeal is completed, if an applicant chooses to wait.

Thomas Easterly moved to give preliminary adoption to amendments to 312 IAC 11 to extend the effective duration of specified types of permits issued under the Lakes Preservation Act. R.T. Green seconded the motion. On a voice vote, the motion carried.

The “Notice of Intent to Adopt a Rule” for the proposed amendments was posted to the INDIANA REGISTER at 20120523-IR-312120270NIA on May 23, 2012. The notice identified James Hebenstreit as the “small business regulatory coordinator” for purposes of IC 4-22-2-28.1.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to the Office of Management and Budget on June 26, 2012. In a letter dated July 11, 2012, Adam M. Horst, Director, Office of Management and Budget, recommended that the fiscal analyses for the proposed amendments be approved.

The Division of Hearings submitted the rule proposal to the Legislative Services Agency, along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”), on July 13, 2012. The Notice of Public Hearing was submitted to the Legislative Services Agency on July 16, 2012. On July 25, 2012, the following were posted to the INDIANA REGISTER: the text of the proposed rule at 20120725-IR-312120270PRA; the notice of public hearing along with a statement the proposal would not impose requirements or costs under IC 4-22-2-24(d)(3) at 20120725-IR-312120270PHA; and the Economic Impact Statement at 20120725-IR-312120270EIA.

Following receipt of an “Authorization to Proceed” from the Legislative Services Agency on July 16, 2012, the Division of Hearings caused a Notice of Public Hearing to be published by the

Indianapolis Newspapers in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County Indiana, on July 23, 2012. In addition, the notice of the public hearing and a summary of the proposed rule changes were posted on the Commission's web-based electronic calendar and the online rule docket at <http://www.in.gov/nrc/2377.htm>.

The Statement Concerning Rules Affecting Small Businesses (the "EIS"), as required under IC 4-22-2.1-5, and posed to the INDIANA REGISTER, states in pertinent part, follows:

TITLE 312 NATURAL RESOURCES COMMISSION

Economic Impact Statement LSA Document #12-270

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

Estimated Number of Small Businesses Subject to this Rule:

The Department of Natural Resources currently regulates construction activities in public freshwater lakes pursuant to [IC 14-26-2](#) and [312 IAC 11](#). Pursuant to the statute, permits are valid for only two years from the date of approval. Included in the regulated activities are the placement of temporary structures such as group piers and dredging. Piers are typically put out in the spring and removed each winter but many times they are installed in the same configuration year after year. Dredging projects sometimes cannot be completed in two years because of the size of the project and weather considerations. The proposed rule would allow permits for these type of projects to be extended beyond a two-year period. The change will save small businesses the costs of the application fee and preparing supporting documentation every two years and eliminate the need for Department staff to re-review the same project every two years.

Based on a review of the permits issued in the last five years, it is believed that 20 to 25 of these types of permits may have been issued to small businesses annually.

Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:

There are no annual reporting or specific record keeping requirements or costs contained in the new rule.

Estimated Total Annual Economic Impact on Small Businesses to Comply:

The proposed rules should result in an annual cost savings to small businesses that have obtained a permit for a temporary structure or dredging pursuant to [IC 14-26-2](#). That statute provides that permits are valid for only two years meaning that a permit needs to be renewed every two years if the temporary structure continues to be placed in the lake or additional time is needed to complete a dredging project. Permit fees under [IC 14-26-2](#) are \$100. The proposed rule provides a mechanism for permit renewal that eliminates the need to apply for a new permit in certain instances saving the small business the cost of preparing a permit application and supporting materials.

Justification Statement of Requirement or Cost:

There should be no additional costs to small businesses as a result of the rule amendment, and the change should provide a cost savings.

Regulatory Flexibility Analysis of Alternative Methods:

The rule provides a mechanism for small businesses to renew a permit in certain circumstances without the need for filing a new permit application every two years. The

alternative is to continue to require an applicant to reapply for a permit every two years with the resultant expense which might be incurred to complete the permit application and provide supporting materials. That alternative results in an unnecessary expense for small businesses and a duplicative effort for the agency to review the “same project” again and again.

Review by the Indiana Economic Development Corporation was not required based on DNR’s economic analyses.

2. PUBLIC HEARING AND WRITTEN COMMENTS

The public hearing was convened as scheduled on August 28, 2012. James J. Hebenstreit, Assistant Director of DNR’s Division of Water, was the only person who appeared.

A person could file written comments through the Commission’s online comment form accessible at <http://www.in.gov/nrc/2377.htm>. Comments could also be filed by U.S. mail. The comment period closed at the end of day on August 28, 2012. No comments were received.

3. HEARING OFFICER ANALYSES AND RECOMMENDATIONS

The former Lake Management Work Group was among entities that in 2008 supported SB 40 to authorize the Natural Resources Commission to identify circumstances when license duration of longer than two years should be approved under IC 14-26-2 (the “Lakes Preservation Act”). SB 40 was not enacted, but the following year HB 1381 became P.L. 25-2009 and authorized the Commission, by rule, to identify licenses with duration of longer than two years. In its “Final Report” to the General Assembly, the Lake Management Work Group included the legislation that is now codified at IC 14-26-2-17(b) as one of its accomplishments. “Final Report Actions of the Indiana Lake Management Work Group (2000-2012)”, June 2012, p. 57.

From its enactment in 1947 of the antecedents to the Lakes Preservation Act, the Indiana General Assembly set forth the general principle that a license expires two years after issuance. Acts 1947, c. 301, ss. 3, 4. The principle supports predictability in the exercise of a license opportunity, administrative efficiency, and the performance of construction activities according to current regulations and expectations. As James Hebenstreit observed when he recommended these amendments to the Commission in July 2011, for most activities the two-year period is

adequate. Except for those circumstances identified in proposed 312 IAC 11-3.5, the two-year limitation would continue. But as Hebenstreit also observed, the limitation can be problematic in a growing number of circumstances. The proposed amendments seek to address these.

As provided in proposed 312 IAC 11-3.5, extended license duration would be available for activities that qualify in three circumstances: (1) temporary structures, particularly those such as piers that anticipate seasonal removal and replacement; (2) dredging activities; and (3) projects contingent upon the receipt of Federal funding or funding under the Lake and River Enhancement Fund (“LARE”) established at IC 6-6-11.

With respect to temporary structures in 1990, the Commission provided significant relief from the potentially harsh results of the two-year license duration by adopting rules that granted general license status for most piers. 310 IAC 6-2-14 [repealed] and recodified in 1999 at 312 IAC 11-3-1. As long as a person places or replaces properly a temporary pier that qualifies for a general license, the authorized duration is effectively indefinite.

The relief provided by 312 IAC 11-3-1 does not extend to a license for a pier or other temporary structure for which an individual license is required or issued. The most notable example is for a “group pier”, but individual licenses are also required for a “marina” and in other circumstances. In 1999 and as augmented by 2003 amendments, the Commission again provided relief with the adoption of 312 IAC 11-5-2 governing lawful nonconforming uses (or what is sometimes referred to as “grandfathering”). A group pier, marina, or similar structure that would require individual licensure, if new, might still qualify as a lawful nonconforming use if licensure was not required when the structure came into existence. *DNR v. Freeman Orchard Assoc., Inc.*, 11 Caddnar 285 (2008).

But group piers and similar structures are fertile grounds for litigation, both administrative and civil, and most notably when the history of placement (the footprint) cannot be readily determined from year-to-year. Proposed 312 IAC 11-3.5 offers the opportunity for clarity if the owner or the successor-in-interest to the owner will continue to place them seasonally in the same footprint. Clarity can reduce the likelihood or complexity of litigation.

For temporary structures, 312 IAC 11-3.5 offers an important advancement consistent with prior Commission reforms. The amendments would serve clarity and offer strategies that can reduce conflicts among competing users of public freshwater lakes. The DNR is relieved from duplicative licensure that is a wasteful use of public and private resources, regardless of whether the duplication is motivated by legal necessity or by human uncertainty. The adoption of 312 IAC 11-3.5 is warranted in the consideration of temporary structures.

With respect to dredging and projects contingent upon Federal or LARE funding, 312 IAC 11-3.5 resolves problems with two-year licenses that were not previously addressed by the Lakes Preservation Act or by 312 IAC 11. A dredging project that satisfies 312 IAC 11-3.5-3(b) can be brought to a successful and cost-effective conclusion. Pursuant to 312 IAC 11-3.5-4, an applicant pursuing a project dependent upon Federal or LARE funding is provided five years to negotiate the challenges of financial applications and grants. The adoption of 312 IAC 11-3.5 can be essential to the success of dredging projects and those dependent upon governmental funding.

Proposed 312 IAC 11-3.5-5 would offer one other noteworthy advancement. For licensure actions that become the subject of administrative review under IC 4-21.5, the period for completion of a project does not begin until a final disposition of the review. This result could result from the specific terms of a Commission order on administrative review or of a Court order on judicial review, but Section 5 would make the extension automatic and unequivocal. This amendment is also warranted.

The hearing officer recommends that 312 IAC 11-3.5 be given final adoption, as posted by the Legislative Services Agency following the Commission's preliminary adoption, and as set forth in Exhibit A.

Dated: August 29, 2012

Stephen L. Lucas
Hearing Officer

EXHIBIT A

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule
LSA Document #12-270(F)

DIGEST

Adds 312 IAC 11-3.5, concerning the management of public freshwater lakes, to authorize extended license durations for qualified temporary structures and dredging activities under IC 14-26-2-17, including qualified temporary structures that may be removed on a seasonal basis, dredging projects, and licenses contingent on federal or state funding. Effective July 1, 2013.

312 IAC 11-3.5

SECTION 1. 312 IAC 11-3.5 IS ADDED TO READ AS FOLLOWS:

Rule 3.5. Extended Duration for Qualified Licenses

312 IAC 11-3.5-1 General principle for expiration of licenses issued under IC 14-26-2 and 312 IAC 11 with exceptions to extend duration

Authority: IC 14-10-2-4; IC 14-26-2-17; IC 14-26-2-23

Affected: IC 14-26-2

Sec. 1. A license under IC 14-26-2 and 312 IAC 11 expires two (2) years after issuance unless:

(1) otherwise provided in this rule; or

(2) issued under:

(A) LSA Document #11-376(E), posted at 20110629-IR-312110376ERA, before its expiration on July 1, 2012; or

(B) LSA Document #12-395(E), posted at 20120711-IR-312120395ERA, before its expiration on July 1, 2013.

(Natural Resources Commission; 312 IAC 11-3.5-1)

312 IAC 11-3.5-2 Effectiveness of individual licenses for temporary structures; seasonal removal and replacement

Authority: IC 14-10-2-4; IC 14-26-2-17; IC 14-26-2-23

Affected: IC 14-26-2

Sec. 2. (a) Except as provided in section 5 of this rule, an individual license to construct a temporary structure expires unless the license holder completes the structure within two (2) years of the effective date of the license.

(b) Subsequent seasonal removal of a temporary structure completed timely under subsection (a) or section 5 of this rule does not terminate a license, if the temporary structure conforms to the terms of the license when the structure is replaced.

(c) Subsection (b) applies to any temporary structure for which the department issues an individual license under this article after December 31, 2005.

(d) A person who wishes to modify a condition of an individual license to place a temporary structure must complete another licensure process before the structure is placed.

(Natural Resources Commission; 312 IAC 11-3.5-2)

312 IAC 11-3.5-3 Effectiveness of license to conduct dredging

Authority: IC 14-10-2-4; IC 14-26-2-17; IC 14-26-2-23

Affected: IC 14-26-2

Sec. 3. (a) Except as provided in subsection (b) and section 5 of this rule, a license to perform dredging expires two (2) years after issuance by the department.

(b) The deputy director for the bureau of water and resource regulation may extend the duration of a license for one (1) additional period, not to exceed two (2) years, upon receipt of a written request from the license holder that demonstrates one (1) or more of the following:

(1) Extraordinary climatic conditions have prevented completion of the anticipated project.

(2) An unreasonable hazard to navigation or otherwise to public safety is likely to result if an extension is not granted.

(3) Unreasonable detrimental effects upon fish, wildlife, or botanical resources are likely to result if an extension is not granted.

(4) The project cannot be completed within the original period of two (2) years as a result of causes that:

(A) were outside the control of the license holder; and

(B) could not have been avoided by the license holder's exercise of due care.

(Natural Resources Commission; 312 IAC 11-3.5-3)

312 IAC 11-3.5-4 Effectiveness of license contingent upon funding from the federal government or the Lake and River Enhancement Fund

Authority: IC 14-10-2-4; IC 14-26-2-17; IC 14-26-2-23

Affected: IC 6-6-11; IC 14-26-2

Sec. 4. Except as provided in section 5 of this rule, a license expires five (5) years from the date of issuance if the application was made expressly contingent upon the receipt of funding from either the:

(1) federal government; or

(2) Lake and River Enhancement Fund established by IC 6-6-11.

(Natural Resources Commission; 312 IAC 11-3.5-4)

312 IAC 11-3.5-5 Effectiveness of license extended by review

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-2-23

Affected: IC 4-21.5; IC 14-26-2

Sec. 5. If a person seeks review under IC 4-21.5 and 312 IAC 3-1 of a license issued by the department under IC 14-26-2 and this article, the term of the license is calculated from the date of final disposition of the review.

(Natural Resources Commission; 312 IAC 11-3.5-5)

SECTION 2. SECTION 1 of this document takes effect July 1, 2013.